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NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES (NIFLA) V. BECERRA, OR THE RIGHT TO BE INFORMED ABOUT YOUR OWN REPRODUCTIVE RIGHTS¹

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Abstract

The Supreme Court has issued its decision in *NIFLA v. Becerra*, a 5–4 vote holding that the state of California cannot compel pregnancy-resource centers to advertise for the state's abortion services. This decision represents a considerable victory for both the right to free speech and the conscience rights of pro-life Americans. The case concerned California's Reproductive FACT Act, which mandated that both licensed and unlicensed women's-health clinics (crisis-pregnancy or pregnancy-resource centers) not performing abortions had to provide a pre-written notice to clients.

Though the law related specifically to abortion, free speech was the fundamental issue at stake. This paper analyzes the history of abortion in US legislation and the perspective of one of its fundamental civil rights.

Keywords

Abortion, health, rights.

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Resumen

La Corte Suprema americana emitió su decisión en el caso *NIFLA v. Becerra*, con una votación de 5 a 4, que sostiene que el estado de California no puede obligar a los centros de recursos para el embarazo a hacer publicidad de los servicios de aborto del estado. Esta decisión representa una victoria considerable tanto para el derecho a la libertad de expresión como para los derechos de conciencia de las asociaciones estadounidenses pro-vida. El caso se refería a la Ley sobre la Reproducción de California, que ordenaba que tanto las clínicas de salud para mujeres con licencia como las que no tienen licencia (centros de recursos para embarazadas en crisis) que no realizan abortos deben proporcionar un aviso escrito previamente a los clientes.

Aunque la ley se relacionaba específicamente con el aborto, la libertad de expresión era el tema fundamental en juego. Este trabajo analiza la historia del aborto en la legislación estadounidense y la perspectiva de uno de sus derechos civiles fundamentales.

Palabras clave

Aborto, salud, derechos.

Summary: 1. Prologue. - 2. The *NIFLA v. Becerra* case and the Reproductive Fact Act of 2015. - 2.1. The *NIFLA v. Beccera* decision and the question of «deceptive speech». - 3. The legal precedents in the matter of the right to abortion. - 3.1. *Roe v. Wade* and the (up and down) path of conflict between Pro-Choice and Pro-Life. - 3.2. The *Planned Parenthood v. Casey* case and the principle of *undue burden*. - 3.3. The *Whole Woman's Health et al. V. Hellerstedt* sentence: the rule of continuity of the principle. - 4. Banning abortion as a current trend in the USA. - 5. What if *Roe v. Wade* is overturned? - 6. Some final considerations.

1. Prologue

At the end of June last year, the U.S. Supreme Court deliberately chose to hinder the path of women who are seeking information on their reproductive rights and want to choose to practice voluntary interruption of pregnancy. Abortion is one of the issues that emotionally upsets most of American society and public discussion has often turned into an accusation of women who choose to make use of a right guaranteed by law. The strong mobilization of society on reproductive issues has split into two distinct thought movements that have gone head to head over the last thirty years, up until the most recent period that sees a turning point (and not only) towards the freedom to choose after receiving the fair and correct information (Yarnold, 1995). Women's right to abortion - sanctioned in 1973 by a Supreme Court ruling, known as *Roe vs Wade* - is under siege by both those who freely manifest in the streets, and by the world of professionals.

In the last three years, there has been a wave of restrictive measures that have limited the right to the termination of pregnancies in more than half of U.S. states. These restrictions have forced many clinics to close down and they have made the use of abortion a difficult path in various areas of the country, also due to some electoral outcomes that have recorded the prevalence of deputies coming from anti-abortion movements. The question has heavily conditioned American politics in recent decades, making abortion a constant theme in every election campaign, whereas until a few years ago in European countries - even, perhaps above all, in the Catholic ones, and among them Italy - it appeared to be a theme of the past, the interest and clamor of which belonged to history.

The complexity of the American situation has entered the halls of the Government, even with provisions aimed at affecting the behavioral modalities of women: the reference is to the decision of the State of Massachusetts to guarantee the safety of women who enter abortion clinics with "buffer zones", to protect them from intimidation and violence and to allow anti-abortion demonstrators to make pickets, distribute leaflets and therefore freely express their dissent (Howe, 2014)². The connection between private decisions and public rules does not make the choices of women less difficult: the

2 In 2007, Massachusetts passed a law that makes it a crime to stand on a public road or sidewalk within thirty-five meters of any abortion clinic in the state. Yesterday, the Supreme Court demolished the "buffer zone" of Massachusetts, siding with a group of opponents of abortion who claimed that the law was unconstitutional because it prevented them from being able to advise and offer assistance to women entering the clinics. (Cosi & Howe, 2014).

perennial economic uncertainties, the unequal wage treatment between men and women, the delayed planning of the subsidiary project, the high costs of private health have in fact had an impact on the legislation, even affecting research projects and federal funding. Even though, as will be seen, the *Roe vs. Wade* sentence is weakened in its theoretical assumptions by some subsequent rulings, it continues to be the decision to refer to in assessing the constitutionality of state legislation³.

This historic decision of 1973 imposed a precise choice of value in favor of women's freedom, by inaugurating an active role for the Court in the regulation of a subject that until then had been almost neglected. Precisely this activism and the incisiveness of the interventions substantially subtracted from the States the possibility of interacting with the judicial authority. However, there is no doubt that, in the United States, there is a gap between the prudence of the legislator and the abortion practice, which affects more than one point five million young American women every year and which coincides with the exercise of one of the most controversial fundamental rights of democratic history.

At present, it is even more in the spotlight due to an interest in claiming the move in a "restrictive" sense, in order to satisfy a large part of the more conservative electorate. The case in question analyzes the themes of information asymmetries in terms of health, the cultural capacity of women to understand the messages related to the consequences connected to the voluntary interruption of pregnancy and, in the background, the fate of reproductive rights in countries where populism - and sovereign ambitions - often obscure the dutiful virtuous paths of public policies.

2. The case of NIFLA vs. Becerra and the Reproductive Fact Act of 2015

In the Supreme Court decision in the case of the National Institute of Family and Life Advocates (NIFLA) vs. *Becerra* (2018), the judges ruled that California cannot force the "*crisis-pregnancy*" centers to publish "*signs about state-sponsored abortion services*"; regardless of whether or not such facilities are composed of licensed physicians.

³ After what seemed like a barrage of legislative attacks on abortion rights this year, some states are hitting back - as will be discussed later - by strengthening their laws to protect the right to an abortion. Illinois, Maine, Nevada, New Jersey, New York, Rhode Island, and Vermont have all passed legislation this year expanding access to abortion in various ways. In the current political climate, where some fear that *Roe v. Wade* is in danger of being gutted or overturned, state legislatures are a key battleground in the abortion fight.

The decision has in fact supported the reasons of the pro-life defenders, and has always advocated the theory that states and cities created these centers in order to provide alternative pregnancy services to women who do not want to abort. More importantly, the decision looked - and consequently favored - in a privileged manner the reasons of the pro-life voters, who trust in the interventions of the Supreme Court to limit the right of abortion in America.

The legislative substrate referred to is the Californian *Reproductive FACT Act* of 2015, which was approved after the legislator and activists worried about the increase of the “*crisis-pregnancy Centers*” within the state. Many of these centers have existed for decades and were designed to offer services to women with unexpected pregnancies, but uncertain about whether and how to perform an abortion and uncertain about the medical pathway to be undertaken. The law states that

Existing law, the Reproductive Privacy Act, provides that every individual possesses a fundamental right of privacy with respect to reproductive decisions. Existing law provides that the state shall not deny or interfere with a woman’s right to choose or obtain an abortion prior to viability of the fetus, as defined, or when necessary to protect her life or health. Existing law specifies the circumstances under which the performance of an abortion is deemed unauthorized. (Reproductive FACT Act, 2015)

In other words, the law establishes that California medical centers have two legal obligations for patients who ask for help: the first is not to interfere with the woman’s legal right to choose between aborting or not. In addition, the medical center must demonstrate that it is a practice with a medical license and with authorized medical personnel. Secondly, the law states that these centers must educate patients “*on California’s availability of subsidized health care and its eligibility criterion*”. The principle of transparency of the law requires this information to be placed in the waiting rooms of medical centers, on the free vision of patients seeking information. Many people fear that this informational methodology could have a negative impact on women’s reproductive health, in particular for those coming from poorer and less culturally trained environments, therefore lacking the tools to decode medical information in those Centers generally provided (Chen, 2014). This is because the main objective of the *Reproductive FACT Act* is to allow women to know which services they can access, without worrying about financial costs. The law requires “a licensed covered facility” to affirm

the principle that “California has public programs that provide immediate free or low-cost access to comprehensive family planning services, prenatal care, and abortion, for eligible women” (Reproductive FACT Act, 2015).

In the period following the entry into force of this law, some of the “*crisis-pregnancy Centers*” have encountered difficulties in reconciling the religious choices of many of their employees and volunteers with the pregnancy termination project. In this sense, it was supported that California - through the enactment of the *Reproductive FACT Act* - had violated the rights of the First Amendment of these people, because it obliged them to operate in contempt of how much they cared about their respective consciences. In the *NIFLA vs. Becerra* decision - taken by majority - Judge Clarence Thomas agreed that the law could endanger the First Amendment, stating that this legislative instrument “imposes a government-scripted, speaker-based disclosure requirement that is a wholly disconnected from the State’s informational interest” (*NIFLA vs. Becerra*, 2018). Now, again in the judgment of Judge Thomas, since the law selected only certain types of structures, there was a risk “*of only limiting the speech of those who disagree with the state views on abortion*”.

One of the great questions arising from this case is whether California can regulate communications in the “*crisis-pregnancy Centers*” as a form of “*professional speech*”, a somewhat confusing legal category that allows states to ask doctors and lawyers to disclose medical or ethical facts without the mediation of the professional who is able to simplify legal procedures or explain medical diagnoses in depth. California has argued that these “*crisis-pregnancy Centers*” are authorized medical providers and should be regulated to allow women not to be confused about the nature of unauthorized facilities for the ambiguous advertising message they launch. In particular, one of the judges argued that if California wanted to make sure low-income women knew about its low-cost family planning services, the way they chose was not acceptable. Another judge had a different opinion according to which the *Reproductive FACT Act* represents a paradigmatic example of the serious threat that occurs when the government tries to impose its message in place of the individual will. The theme that emerged is therefore one of balancing the rights of the First Amendment with public health concerns, in terms of the need to provide (potential) patients with accurate and correct information.

2.1. The *NIFLA vs. Becerra* decision and the theme of «deceptive speech»

The 2018 *NIFLA vs. Becerra* case of the Supreme Court was framed as a debate on abortion rights, but a new analysis reveals that the Court has been silent on one of the key questions of the case: the «*deceptive speech*»⁴ and the potential violation of the rule of informed consent. California law has required that clinics that attend to the needs of pregnant women provide “one of two government notices”: one for authorized clinics on the availability of state health services, including abortion, and one for unlicensed clinics they notify to potential customers that the clinics are not authorized medical facilities and do not have authorized medical professionals on site. In its decision, the Supreme Court found that both the requirements of “government notices” violated the rights of the clinic, present in the provisions of the First Amendment. Although the law itself does not refer to the clinics in question as centers of pregnancy in crisis that oppose abortion, the Court found that these clinics “were targeted in an important lesson for policymakers”.

At a closer look, in addition to the Court’s conclusions on the ability of States to regulate the issue of reproductive health, the *NIFLA vs. Becerra* decision, seems to have wider implications for the government’s ability to request “purely factual disclosures in the commercial context” (Pomeranz, 2019). These requirements - which are essentially related to commercial rules - have been designed and regulated to protect the consumer and public health instruments intended to prevent deception or warn consumers of potential damage to health and safety. The courts regularly support these disclosure requirements⁵; however, as noted by careful doctrine, in the last two decades the Supreme Court has guaranteed greater protection for businesses and reduced deference to government regulations. In *Becerra*, the Court found that the *Zauderer vs. Office of Disciplinary Counsel* decision does not apply to the aforementioned requirements, because communications are not limited to “purely factual disclosures”⁶.

4 The reference is to research conducted by the NYU College of Global Public Health, published in the American Journal of Public Health.

5 The commercial disclosure requirements include, for example, information on calories in restaurant menus, as consistent with the First Amendment: in this sense, the *Zauderer vs. Office of the Disciplinary Counsel* decision taken by the Supreme Court of 1985.

6 *Zauderer vs. Office of Disciplinary Counsel*, Supreme Court of Ohio. 471 U.S. 626 (1985).

It appears that the Court has deliberately avoided addressing the problem of “deceptive speech”, a central theme for the reasoning to be conducted in relation to information provided in unlicensed California clinical facilities. Therefore, the incomplete opinion of the Supreme Court creates new uncertainties about the government’s ability to request the disclosure of correct and concrete information in the context of reproductive health services and more generally in the commercial context. However, the Court’s silence on “deceptive speech” highlights a potential road to future regulation.

The current orientation of the U.S. Supreme Court is to believe that states can prohibit abortion after ascertaining fetal viability, as long as there are exceptions for the life and health (both physical and mental) of women. According to this orientation, vitality - which can vary from 24 to 28 weeks after the beginning of a woman’s last menstrual cycle - must be determined on an individual basis and decisions on both fetal viability and women’s health are at the discretion of the physician. In addition, states may not require additional medical personnel to confirm the judgment of a treating physician that a woman’s life or health is at risk in the event of a medical emergency. The requirements requested by the Court concern the times and circumstances of an abortion in the hands of the patient and, after its *viability*⁷, the doctor.

Most states limit abortion at a specific time during pregnancy, which normally lasts 40 weeks. In recent years, however, some state policymakers have attempted to provoke a challenge to the Supreme Court, prohibiting abortion before vitality. Federal and state courts have consistently blocked the application of laws prohibiting abortion for 13 weeks, but more than a third of states have successfully implemented what are termed “20-week abortion bans”. These bans are based on the belief that a fetus can feel pain 20 weeks after fertilization (an estimated date of conception), equivalent to 22 weeks. Other states have enacted laws that strictly prohibit or limit abortion in the second or third trimester (starting from 13 weeks and 25 weeks of pregnancy respectively). In the event of a dispute, the courts have effectively exceeded the laws in force, introducing a general ban on abortion in a given week or in a given quarter, in addition to specific ones with exceptions relating to the right to health. However, not all of these restrictions have been challenged in court. As a result, some states have precepts that do not meet the Court’s requirements: for example, Michigan allows a post-operative abortion only if the

7 When the Supreme Court speaks of viability, it tends to refer to “The point at which a fetus can sustain survival outside the womb. Determined based on the fetus’s developmental progress and may vary by pregnancy. A fetus generally reaches viability between 24 and 28 weeks LMP”.

According to Hart Ely (1996), the use of the concept (moral rather than legal in nature) of “viability”, which marks the moment when the fetus becomes “potentially able to live outside the mother’s womb, albeit with artificial aid”.

woman's life is in danger, a clear violation of the health exception requested by Roe. Furthermore, some States continue to maintain and enact new laws requiring the involvement of a second doctor to certify or attend abortion in particular circumstances.

The decision of the *NIFLA vs. Becerra* case falls in this context: it was taken with five votes against four. The verdict entails the revocation of a California state law (the *Reproductive FACT Act*, or FACTA, 2015) which will prevent forcing the fake abortion clinics exposing information boards on the possibility, for the women who go there, to be able to turn to other structures should they decide to abort. According to the provisions of the FACTA, the “crisis-pregnancy Centers” had to provide exhaustive information to patients about the possibility of free (or very low clinical costs for) abortion, and it had been approved given the widespread use of these centers, which are supported from the pro-life movement. Predictably, the law did not find favor with many “crisis-pregnancy Centers” and with NIFLA, which sued, alleging the violation of their right to express: informing patients of those practices meant forcing the staff of the clinics to go against one's conscience and one's ethical imperatives.

This was precisely the motivation accepted by Judge Justice Clarence Thomas which led to the Court's ruling: many of those centers set themselves a religious mission and forcing them to act contrary to it would mean violating the First Amendment. According to Thomas, in fact, the law imposes “a requirement predetermined by the government” which is “completely detached from the interest in informing the state” and closer instead to the wishes of the parliamentarians who supported it. Thomas also commented that, if the State of California intends to educate its population about the services offered in the context of abortion, it must do so with an adequate campaign, and not delegate the task to the “crisis-pregnancy Centers”.

3. Legal precedents regarding the right to abortion

The long road to legalizing voluntary abortion in the United States was fraught with difficulties: consider that a Connecticut state law - dating back to 1879 - criminally prohibited the use of any type of contraceptive (Rizzieri, 2001)⁸. In 1972, The Supreme Court held that the law was unconstitutional, as it violated the spouses' right to privacy:

8 As claimed by Rizzieri (2001), “In 1961 Estelle Griswold, physician and director of Planned Parenthood League of Connecticut, was accused of providing her patients with information on how to prevent conception, in particular by advising women to use particular types of birth control.”

in other words, the prohibition involved an illegal intrusion of the state into married life, hindering choices that had to be referred to the exclusive will of spouses⁹. The reference to the *right of privacy* was first expressed by the Supreme Court, according to which, although not expressly mentioned (“unenumerated”) in the *Bill of Rights* (and subsequent amendments to the Constitution), this right had full constitutional significance and it was found in the “folds” of some Amendments¹⁰, which presupposed the existence of “penumbras” or “zones of privacy” from which the existence of a more general right to *privacy* could be derived.

Already at the beginning of the seventies of the last century, the movements protecting women’s rights and advocating the legalization of abortion had taken a prominent position in public opinion. While the anti-abortionists were mostly represented by various religious organizations, which were not able to oppose a common front to the abortionists’ claims. Often finding themselves in conflict with each other, many doctors took to the *pro-choice* coalition: the category was traditionally opposed to abortion, but now it was demanding its liberalization, taking note of the fact that many of its members already executed it in violation of the law. In addition to recognizing the freedom to abort, in this context, and based on the English model, the doctor has a decisive role in the choice of the woman to interrupt the pregnancy. The Supreme Court in 1973 was aware of the role assumed by the *right of privacy*, and the fact that it represented a concept of synthesis, which contained freedom of different content within its scope. In fact, in this case, the Court affirmed that the content of the right to *privacy* was sufficiently wide enough to include the freedom of a woman to decide the fate of her pregnancy (Rizzieri, 2001). Following the 1973 Supreme Court ruling, there has been a rapid multiplication of privately run specialized clinics. The *Planned Parenthood* organization is one of the protagonists of the abortion movement and numerous legal disputes and it has taken on an almost monopolistic role in the management of abortion clinics¹¹.

In the following decades, we witness significant decisions, up to reaching the sentence in comment. In recent times, American states have approved more than 400 state restrictions on abortion, which have contributed to the abundant misinformation about

9 With the *Eisenstadt vs. Baird* decision (1972) the free use of contraceptives was also recognized to unmarried people.

10 The reference is to the First, the Third, the Fourth, the Fifth and the Ninth Amendment.

11 The *Planned Parenthood* organization has often been accused of unfair competition with other private clinics. One of its accusers is the lawyer Bill Baird, historical leader of the abortion movement, according to which “*Planned Parenthood* goes into new geographic area and opens a clinic near a preexisting abortion clinic that is independent of *Planned Parenthood*... because *Planned Parenthood* is a recipient of large federal grants, it is able to provide abortions at a much lower fee than a private abortion clinic can. Hence, over the course of time, the preexisting private abortion clinic, unable to compete with the lower fees offered by *Planned Parenthood* affiliates, is forced to go out of business”.

See Yarnold (1995).

procedures and treatments for this medical practice. These state laws restrict access and are often not based on medical science, as evidenced by the growth of pregnancy crisis centers (CPCs), which are organizations designed to convince women not to abort. These structures represent a problem not only for access to voluntary termination of pregnancy, but for reproductive health in general. *Crisis pregnancy Centers* often receive state funding and are significantly more widespread than abortion clinics in the United States, and they are often located near abortion clinics in an attempt to divert patients from abortion centers and route them to CPCs. Recent Supreme Court decisions ensure that access to abortion will be an important area of political challenge for both conservatives and progressives, hinting at potential drastic changes in access to abortion services and reproductive rights more generally, all over the United States. In order to frame such a demanding issue, this essay intends to reconstruct the most significant cases in the path of women's reproductive rights, to arrive at the latest legal decisions on the subject.

3.1. *Roe vs. Wade* e the (up and down) path of the conflict between *Pro-Choice* and *Pro-Life*.

In its famous abortion decisions, the U.S. Supreme Court recognized a constitutional right to abortion, but stated that the States could prohibit abortion after fetal vitality - the point where a fetus can sustain life outside the womb - if their policies meet certain requirements (Pomeranz, 2019). The *Roe vs. Wade* judgment is a very important sentence of 1973. It is one of the most controversial that the United States Supreme Court has ever pronounced. The two parties involved - Roe and Wade - have become, (not only) in American culture, the representatives of two different currents of thought in relation to the question of abortion: the first of the two embodies the current *Pro-Choice*, and Wade's vision represents the spirit of *Pro-Life*. In *Roe vs. Wade*, Norma McCorvey, known as Jane Roe (pseudonym used for the protection of privacy), fell pregnant for the third time, and decided to start - with the support of the lawyer Sarah Weddington - a trial before the District Court against the anti-laws abortion of the State of Texas, where the abortion ban was in force, except in cases where the life of the woman was put at risk (Scheb & Scheb II, 2002). Wade, the lawyer who represented the State of Texas - in disagreement with the Federal Court's decision - decided to appeal to the Supreme Court, which, in the aforementioned year, issued the sentence that influenced not only the specific case but the fate from 46 other States (Linton, 2012).

The request, made by Weddington, for the declaration of unconstitutionality of the Texan law was accepted by the Court on the basis of the interpretation of Amendment IX of the Constitution, which mentions individual rights (including the right to privacy), and the possibility of the latter being supplemented by other rights not explicitly expressed in the Constitution. The right to choose about the future of one's pregnancy was included among them. Both the District Court and the Supreme Court of the United States declared the contested law unconstitutional, holding that the limitations imposed on the woman's decision to abort violated her *right to privacy*, a right which, although not expressly provided for by the Constitution, had already been previously identified by the case law based on the *penumbra* of other rights in the *Bill of rights*. In particular, the Supreme Court stated that

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. (*Roe v. Wade*, 1973)

However, this right was not conceived as absolute, but rather conditioned and limited by the presence of the State's interest in the protection of potential life, whose relevance is manifested increasingly in the course of pregnancy.

The State's interest in protecting women's health, on the one hand, and that of protecting potential life, on the other, were then outlined by the Court distinguishing three different phases with reference to the evolution of pregnancy:

- (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
- (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
- (c) For the stage subsequent to viability the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where necessary, in appropriate medical judgment, for the preservation of the life or health of the mother. (Adams, 2005).

With 7 votes in favor and 2 against, on 22nd January 1973, the Supreme Court delivered a sentence that today still represents a precedent *in primis* for the right to abortion in the American panorama, and even worldwide. With this sentence, in fact, abortion is legalized in the United States, harmonizing a discipline that up until then had been independently regulated by each individual state. According to the legislation of some States, the possibility of interrupting the pregnancy was foreseen only in the cases in which the life of the woman was in danger, following a rape, or for fetal malformations; in others, however, it was forbidden in any case. As established by the Court, in 1973 women were recognized as having the right to decide whether to continue or terminate a pregnancy, based on the interpretation of the XIV Amendment to the United States Constitution, according to which no State can put in place or give executing laws that disregard the privileges or immunities enjoyed by US citizens as such; and no State will deprive any person of life, liberty or property, without “due process of law”, nor will it deny anyone, within the scope of its sovereignty, “equal protection of the laws” (Barsotti, 1999).

3.2. The *Planned Parenthood vs. Casey* case and the principle of *undue burden*

In 1992, the attention of the supreme judges again focused on the topic of voluntary interruption of pregnancy with the case of *Planned Parenthood vs. Casey*¹². In this sentence, with the favorable vote of 5 judges, the Supreme Court expressed itself again in favor of the “Roe” theory, introducing the principle of “*undue burden*”, which meant the impossibility on the part of the State legislation to introduce obstacles aimed at

12 According to the Court’s opinion expressed in this decision, abortion “[involves] the most intimate and personal choices may make a lifetime, central and personal liberty protected by the Fourteenth Amendment. At the heart of liberty is to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs on these matters could not define themselves with the state”.

In this ruling, the question of constitutionality concerned five articles of the Pennsylvania *Abortion Control Act* of 1982. The articles set specific requirements before granting access to the IVG: informed consent given at least 24 hours before the procedure; in the case of the presence of a minor, the informed consent of a parent or approval by a judge; in the case of a married woman, declaration of having notified the spouse of his intention to abort.

Furthermore, the Pennsylvania *Abortion Control Act* excluded the requirements listed above in the event of a medical emergency.

In this decision - characterized by a strong division (4 to 3) - the Court reaffirmed its decision in *Roe vs. Wade* in which the Court recognizes the right of a woman to be able to abort; has decided that the limits to the right to access IVG must be based on the so-called “Undue burden test” (excessive burden test): it has been argued that the definition of “emergency” is wide enough to not consist in an excessive burden; stated that informed consent and parental consent in the case of a minor does not correspond to an excessive burden and stated that the requirement that a married woman must certify that she has notified her spouse constitutes an excessive burden and is therefore invalid..

making it more difficult for women to choose and implement abortion. The sentence of the *Planned Parenthood vs. Casey* case abandoned the “theory of semesters” in favor of the so-called fetal viability threshold¹³. According to the majority of judges, in fact, a fetus would be considered “vital” much earlier, perhaps at the twenty-second or twenty-third week of gestation: with such pronouncement, it was indicated to the States that they did not necessarily have to wait for the third quarter to ban the abortion. This is because - again according to the judges of the *Planned Parenthood vs. Casey* case - the technological progress in the medical field has rendered the temporal scan underlying the sentence on the *Roe* case obsolete.

In 1982, Pennsylvania had approved the *Abortion Control Act*, which required women to give their “informed consent” before abortions could be performed, and imposed a 24-hour waiting period on women willing to voluntarily stop pregnancy, during which information was provided on the practice they were about to perform, the possible side effects, the fate of the fetus, and the physical consequences that could be encountered. The *Abortion Control Act* also provided that minors - who had wanted to abort - should have obtained prior informed consent from their parents, except in cases of “hardship”, in which a court can renounce this requirement; and that, except in “medical emergencies”, a wife who intends to perform an abortion must inform her husband of her plans before carrying out the operation. Finally, the *Act* required that all Pennsylvania abortion clinics inform the state of their activities. *Planned Parenthood of Southeastern Pennsylvania* filed a lawsuit against the State, claiming that the *Abortion Control Act* violated the Supreme Court ruling in *Roe vs. Wade*.

In 1992, after many advances, the Supreme Court issued a ruling on this case, which reiterated what was stated in the *Roe vs. Wade* judgment, but at the same time supporting the constitutionality of most Pennsylvania laws. Taking up many of the arguments put forward about the *Roe* case, the Court first declared that a woman’s decision to abort implies very important “liberty interests” and “privacy interests”, which the *Constitution’s Due Process Clause* protects from state interference. Read in conjunction, these interests form a “substantive right to privacy” that is protected from state interference in

¹³ The sentence on the *Roe* case sought to find a balance between women’s rights and the state’s interest in protecting the potential life of the conceived. Judge Harry Blackmun had ruled that, with regard to the first thirteen weeks or so of pregnancy, states should fully respect a woman’s right to abortion. Starting from the second quarter, and up to the twenty-seventh week approximately, the States can intervene in the regulation of the procedure, but only in case of “reasonable danger for the health of the woman”. Finally, during the last thirteen weeks of gestation, when most fetuses are “vital” (that is to say, able to survive outside the maternal womb), the States have an “urgent” interest in the child, and can therefore completely forbid abortion (except in cases where the pregnancy threatens the life or health of the woman, in which case it must always be allowed).

fundamental issues such as marriage, procreation, contraception, family relationships, and child rearing. The Court then reiterated that this right also protects the abortive decision, because it involves equally personal questions about the autonomy of a woman's choices, her personal sacrifices, emotional and mental health and the fundamental right to define boundaries and determinations of one's life.

With the reaffirmation of the constitutional right to abortion, the Court then reiterated Roe's sentence. Firstly, according to the sentence, the States cannot prohibit abortions before the "viability point" (the point where the fetus is able to support life outside the womb), and secondly, that under no circumstances can States prohibit abortions that help preserve the life or health of the mother (Dworkin, 1996)¹⁴. To the same extent, the Court has also rejected some parts of Roe sentence, believing that the State can legally approve laws that protect the life and health of the fetus or mother in much wider circumstances. For example, while in the Roe case, the Court had ruled that the state could not regulate any aspect of pregnancy terminations performed during the first quarter, the Court then held that states could approve such regulations that had an effect on the first trimester of life of the fetus, but only to safeguard a woman's health, not to limit her access to abortion. Finally, the Court proclaimed that any regulation imposing a "substantial obstacle" that prevents a woman from obtaining a legal abortion is considered an "undue burden" that violates the constitutional right of women to abortion. With these new rules set by the decision *Planned Parenthood vs. Casey*, the Court examined the law of Pennsylvania and measured its constitutionality.

3.3. The *Whole Woman's Health et al. vs. Hellerstedt* sentence: the rule of continuity of the principle

In the sentence *Whole Woman's Health et al. vs. Hellerstedt* of June 27, 2016, the United States Supreme Court again ruled on abortion, with a decision accepted as the most significant on the subject for more than twenty years, sanctioning the constitutional illegitimacy of two provisions of the State of Texas, provided for in *House Bill 2* (H.B.2.), which raised the safety standards required of clinics and professionals, specialized in abortion services (so-called *abortion providers*) (Siegel, 2016; Urley, 2016).

The first of the two provisions, the so-called *admitting-privileges requirement*, requires each structure to have a privileged contact with a hospital located less than 30

¹⁴ For a detailed analysis of this volume, see Giordano – Langford (2017).

miles away. The second, so-called *surgical-center requirement*, requires these structures to comply with the minimum safety standards set for surgical surgeries (Chiericato, 2016)¹⁵. According to a well-known anti-abortion strategy undertaken by many States, these measures have represented a classic example of a *Targeted Regulation of Abortion Providers* (TRAP). This formula refers to the numerous state provisions that, for the declared purpose of protecting health of women, impose increasingly stringent burdens and requirements on operators who practice abortive services to consistently reduce the number and, in doing so, limit the concrete exercise of the right to abortion.

The judges of the Court, with a majority of 5 to 3 (for a total of 8 judges instead of 9, due to the death of Judge Scalia not yet replaced at the time of the ruling), stated that the Texas law violated the principle of “undue burden”, as already established in the 1992 sentence. The Court took the opportunity to specify the *undue burden test*, which is the principle according to which state provisions that impose an excessive burden on the right to abortion are constitutionally illegitimate, and have the purpose or effect of posing a substantial obstacle to women in the free exercise of their own will to abort. On that occasion, the Court warned about the risk on the right to decide on terminating a pregnancy if it was affected by health provisions that had little to do with promoting women’s health. The words of the Court were the following: “as with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion”; however “unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right”. The political value of this sentence is affirmed by the opinions of one of the most authoritative judges of the Supreme Court, according to which

so long as the Court adheres to *Roe v. Wade*, and *Planned Parenthood of South-eastern Pa. v. Casey*, *Targeted Regulation to Abortion Providers* laws like H.B.2 that do little or nothing for health, but rather strew impediments to abortion cannot survive judicial inspection.¹⁶

¹⁵ The author claims that “If at first sight the case would seem to concern solely the provision of health services, these measures have, on the contrary, profound implications on the constitutionally protected right of every woman to decide freely to terminate a pregnancy, recognized in the American order since the historic *Roe vs. Wade* case”.

¹⁶ The reference is to the US Supreme Court judge Ruth Bader Ginsburg who, in joining Judge Stephen Breyer in the majority opinion, wrote her fierce and concomitant opinion, warning the legislator that unnecessary medical restrictions on the right to abortion “*Will never be tolerated by the High Court*”.

4. *Banning abortion as a current tendency in the USA*

Going back to dealing with abortion on several occasions, and using the power of *self restraint* in a limited way, demonstrates not only the importance of the issue for American society, but also the awareness of the Supreme Court about the political role it assumed in the matter under consideration. Abortion rights have been at the center of U.S. state legislation in the first three months of 2019, too. While some States have taken measures to protect access to abortion, these efforts have been overshadowed by more incisive attempts to restrict access. In fact, anti-abortion policy makers have wasted no time in revealing their goal: *banning abortion*. Although the overall number of restrictive abortion regulations introduced so far in 2019 is essentially the same as in the first quarter of 2018, the extreme nature of this year's impositions is unprecedented. The State of New York led the way when it issued the *Reproductive Health Act* on January 22nd, on the 46th anniversary of *Roe vs. Wade*. This new law has affirmed the right to abortion until the fetus is viable and when the life or health of the patient is at risk¹⁷. The same legislative provision also repealed the decision of the State according to which abortion is provided by a doctor. Similar legislation was passed by the first legislative chamber in New Mexico¹⁸, Rhode Island and Vermont. With the addition of New York, 10 States have established legal protection for abortion. In particular, conservative state legislatures are trying to issue abortion bans in the hope of initiating a lawsuit that will give the U.S. Supreme Court, and its majority of conservative judges, ample opportunities to undermine or eliminate abortion rights.

The legislation in question in 28 States prohibits abortion in various ways, introducing rules that automatically make abortion illegal if the provisions of the *Roe vs. Wade case* were overturned, or by imposing gestational age prohibitions that prohibit abortion at a specific point in pregnancy (such as at 6, 18 or 20 weeks after the last menstrual period) or lay down rules prohibiting abortion based on fetal characteristics (such as sex, race or disability); or, finally, rules to prohibit specific types of abortion. These regressive attacks on the right to abortion are only part of the story. Concerned about the future of

¹⁷ The law of the State of New York would extend the guarantee of state coverage of contraceptives, requiring private insurance plans to cover, without shared costs, all the contraceptives approved by the FDA, emergency contraception and male and female sterilization. It would also allow members of private and Medicaid health programs to obtain a 12-month supply of their chosen contraceptive method.

¹⁸ The law of New Mexico would extend the existing law up to the request for private insurance plans to cover, at no shared cost, at least one of each type of contraceptive approved by the FDA (including any type that a supplier considers medically necessary), emergency and sterilization contraception, as well as maintenance and follow-up services. It would also require the Medicaid state program to cover 12 months of contraceptive prescription.

such rights under the aegis of a hostile U.S. Supreme Court, progressive lawmakers in 13 States are pursuing legislation that affirms abortion rights, establishing a legal standard for such practice or repealing existing restrictions.

Meanwhile, although these rights are at the center of many state legislatures, reproductive health problems linked to access to contraceptives and sexual education have also been discussed and addressed. In particular, both are under the lens of politics: the request for complete sex education in schools, as well as a legislation, which would ensure the coverage of contraceptives in health insurance plans, allowing pharmacists to write prescriptions for their free use. More specifically, in the first quarter of 2019, the governors of four states (Arkansas, Kentucky, Mississippi and Utah) signed a total of eight measures prohibiting abortion and other related reproductive rights. Similar measures had already been approved in Arkansas and Georgia and had been adopted by a legislature chamber in six other states. While the approaches vary from state to state, one thing is clear: these efforts to ban abortion violate the fundamental indications of the United States Supreme Court that protect abortion rights in a general sense, limiting the possibility of a state contracting or the right of access.

The most important trend in the restrictions on abortion rights are those legislative documents that prohibit abortion at six weeks, once a fetal heartbeat has been detected. Until the end of March 2019, these restrictions were enacted in Kentucky and Mississippi, approved in Georgia, while one of the chambers was approved in Missouri, Ohio and Tennessee. The new law in Kentucky would have entered into force immediately, but a federal district court issued an order that blocked its execution. The legislation of the Mississippi should come into force in July. Only two other states, Iowa and North Dakota, have issued bans on abortion during the first six weeks of pregnancy, which have been canceled by the courts¹⁹.

¹⁹ These bans have also been extended to other states: the governors of Arkansas and Utah have approved the prohibition of abortion at 18 weeks of pregnancy, allowing - for the first time - that abortion be practiced in this temporal stage of the pregnancy of a woman. Kentucky has banned abortion based on the alleged fetus race or sex or based on the diagnosis of a genetic abnormality (this law, like the law of Kentucky banning abortion at six weeks, is not in effect due to of an ongoing legal action), and Utah has enacted a law banning abortion when a fetus is diagnosed or thought to have Down syndrome: this law should come into effect in May. Currently there are eight states that prohibit abortion for sex selection purposes. Furthermore, Arkansas and Kentucky would become the fifth and sixth states to ban abortion if *Roe v. Wade* was turned upside down.

5. What if *Roe vs. Wade* was overturned?

Basically, since the *Roe vs. Wade* case, the Supreme Court has consistently reaffirmed the fundamental right to abortion, allowing - at the same time - new limits to a woman's ability to exercise the right to voluntary interruption of pregnancy (Siegel, 2008). The composition of the Court - after the appointment of Judge Brett Kavanaugh in 2018 - became more conservative, and it was clearly expected that more States would contest the protections produced in the *Roe vs. Wade* case, limiting abortion in the early stages of pregnancy. Indeed, changes to the composition of the United States Supreme Court in 2018 raised the possibility that the *Roe vs. Wade* case could be seriously undermined - or even overturned - essentially leaving decisions concerning the legalization of abortion to the individual States.

A reversal of the *Roe vs. Wade* case could establish an alternative legal route, a widely seen tactic as an attempt to provoke a legal challenge to a pillar decision for fundamental rights. In fact, many of these prohibitions - approved by the states - have been blocked by court orders that lead to further legal action. Other prohibitions were issued after *Roe* was designed to be "triggered" and take effect automatically, or following a rapid state action if *Roe* was overthrown. As mentioned above, several States even have laws declaring the intention to ban abortion to the extent allowed by the US Constitution, making clear the desire to stop access to abortion in the individual State. Meanwhile, lawmakers in some states have passed laws to protect abortion rights without relying on the *Roe* decision. Most of these policies prohibit the state from interfering with the right to obtain an abortion before the vitality of the fetus or when it is necessary to protect a woman's life or health.

In other words, despite the weightiness of the *Roe vs. Wade* case and the extensive literature created around the decision, the laws of individual States carry out projects aimed at limiting the operation of the constitutional right to voluntary interruption of pregnancy in accordance with a political vision aimed at compressing rights and increasing controls. Precisely in this sense, the State of Alabama, on May 14, 2019 approved - with a Republican majority - the *HB 314 law* which prohibits abortion even in cases of rape and incest. The only exceptions are the serious risk for the health and life of the mother, but the danger must be documented. Outside these cases, abortion is punished as a class A crime (up to 99 years in prison, excluding mothers). It is therefore a law that could lead to the challenging of the "*Roe vs. Wade* case" before the Supreme Court.

After the approval of the law in Alabama, which prohibits abortion even in the event of incest or rape, another U.S. State is preparing to launch a new tightening on the termination of pregnancy. In fact, the Senate of Missouri has approved a law that limits the period in which one can abort. It is limited to eight weeks compared to the current 21 weeks and six days²⁰. The only exceptions are cases of “medical emergencies”, but even in this case rape and incest. Now we need the vote of the State Chamber, controlled by Republicans like the Senate.

6. Some conclusive thought

After what seemed like a barrage of legislative attacks on abortion rights last month, some States are hitting back by strengthening their laws to protect the right to an abortion. Illinois, Maine, Nevada, New Jersey, New York, Rhode Island, and Vermont have all passed legislation this year, expanding access to abortion in various ways. In the current political climate, where some fear that *Roe v. Wade* is in danger of being gutted or overturned, state legislatures are a key battleground in the abortion fight. Legislatures and courts alike have been testing the very limits of the constitutional protections cemented in *Roe*. As deference to *Roe* wavers in the courts, advocates of abortion access are paying close attention to enacting proactive legislation as a strategy.

New York’s Reproductive Health Act, passed this January, is a sweeping measure that codifies the protections of *Roe* within state law. The NY law regulates abortion as healthcare, rather than a criminal act, and expands the types of qualified healthcare professionals that may provide abortion. It also extends post-24 week protections where a pregnant individual’s health or life is in danger, or the fetus is not viable. New laws in Rhode Island, Illinois, and Vermont were also signed into law earlier this month, providing broader protections for individuals seeking abortion care. For reproductive rights advocates, these are legislative victories that come on the heels of a decades-long battle.

Before the most recent wave of proactive legislation, just eight states had statutes codifying the right to an abortion up to viability, according to data published by the Center for Public Health Law Research’s Abortion Law Project. Available on LawAtlas.

²⁰ This is also playing out on the national stage as the Fifth Circuit in *June Medical v. Gee* seemingly sent a direct challenge to Whole Woman’s Health where the Fifth Circuit upheld Louisiana abortion restrictions that were basically identical to the Texas restrictions that were struck down. How *June Medical* is ultimately resolved will have ramifications for telemedicine in this particular context.

org, the data also explore court opinions that interpret state constitutional provisions, such as the right to privacy, as protecting abortion rights. State law initiatives such as these are significant for a few reasons. Most obviously, they unequivocally guarantee the right to abortion by enshrining protections in statutory law, meaning that even if the courts fail to uphold the decision in *Roe*, citizens in states like New York would still have abortion access. Additionally, public support for these laws could help to remove the stigma surrounding abortion and frame it as healthcare, rather than continuing to criminalize abortion providers and their patients.

Furthermore, there's an increasing chance that states will feel encouraged to follow suit by passing similar legislative measures, as demonstrated this year. Though not always rooted in evidence-based practice, states have the ability to set an example for other lawmakers and lead the way for further innovation. We've seen instances of how legislation can catch on like wildfire at the state level, for better or worse. Fetal heart-beat bans and many other types of state abortion restrictions are proposed as a result of "model legislation" pushed out by special interest groups in a nationwide strategy. With abortion rights perceived to be under threat at the federal level, some advocates are taking a page out of their opponents' playbook by enacting proactive state laws.

As these battles unfold in state legislatures, it is important to remember who will be the most affected. Lawmakers in Illinois claimed to be "building a firewall around Illinois to protect access to reproductive healthcare for everyone". While privileged women with the means to travel across state lines will continue to have access to the services they need, historically it was black and brown bodies who had their autonomy stripped away by oppressive political and social institutions. Today, women of color still seek abortions at a much higher rate than white women do, attributed to the lack of affordable healthcare and other manifestations of institutionalized racism. When 75 percent of women seeking abortion are low-income, barriers to safe abortion care hit hardest among those lacking the resources. So while state-by-state initiatives are a crucial tool that finally seems to be paying off in the fight for reproductive justice, the larger challenge ahead is ensuring that access to healthcare is no longer dependent upon a person's income level or zip code (A.R. Ghorashi, 2019)²¹.

It is legitimate the concern of a restrictive view about the rights that the population deemed acquired in the catalog of fundamental values. While considering that a different political orientation, physiologically, brings with it changes that affect the

21 *When It Comes to Abortion Restrictions, State Legislatures Try Fighting Fire with Fire*, in blog.petrieflom.law.harvard.edu

lives of citizens, the case in question has a particular value because it is based on a deceptive assumption and postulates the denial of a right that has its roots in the principle of self-determination of the woman in the choices concerning her person. The difficult events concerning the right to voluntarily interrupt pregnancy also reflects the decision regarding the extension of the personality to the fetus, which cannot be dealt with here. It is plausible to say that it is the task of the Constitution to allow or prohibit abortion explicitly, avoiding the judge “having to face an impossible interpretative undertaking that would inevitably lead him to an arbitrary decision” (Dworkin, 1996)²². Therefore, if it is the Court’s task to faithfully interpret the Constitution and safeguard its values, through which popular sovereignty is exercised, the task of replacing the state legislator is not given. It is thus only up to the State to regulate the matter, and therefore establish the deadline to which a woman is allowed to terminate the pregnancy.

In the background, suggestions and reflections remain which have given voice to daring and truthful considerations: generally women who choose to have an abortion neither wished nor wanted to get pregnant. If they find themselves in this state, it is because men are in control of sexuality, define the conditions, decide and impose the moment and the way in which the relationship must unfold, attribute a stigmatizing social meaning to female employment of contraceptives - an act interpreted as a permanent and universal declaration (direct to all) of a woman’s sexual availability and, therefore, also as a denial at the root of the possibility of being raped (Mackinnon, 2012). This vision coincides with the battle for reproductive freedom that for a long time did not contemplate the right of women to oppose a rejection of an unwanted sexual relationship (Lonzi, 1971)²³. In American iconography, the right to abort - despite the work of sensitive jurists - has not been perceived as freedom from the reproductive consequences of a sexuality defined by men and centered on the heterosexual genital relationship. This absence of paradigm has prevented it from reflecting and concretely express the conditions of gender inequality. As stated, “As long as women do not exercise control over their sexuality, abortion will facilitate the sexual avail-

22 Taking into mind “If a fetus is a constitutional person, then states not only may forbid abortion but, at least in some circumstances, must do so”.

23 The author states that “Conception is the result of a violence of male sexual culture on women, which is then empowered by a situation that instead has suffered. By denying them the freedom to abort, man transforms his abuse into a woman’s fault. By granting her such freedom, man relieves her of her condemnation by drawing her into a new solidarity that remotely removes the time when she asks herself if she goes back to culture, that is to say to man’s dominion, or to anatomy, or natural destiny, the fact that she becomes pregnant”. And again: “The legalization of abortion and even free abortion will serve to codify the voluptuousness of passivity as an expression of the female sex (..) The woman will seal the phallographic sexual culture through a de-dramatized exercise of her use”.

ability of women. In other words, in conditions of gender inequality, sexual liberation understood in this way does not free women, but male sexual aggression” (Mackinnon, 2012).

The reference made by the Roe sentence to the doctrine of *privacy* identifies a concept of State that limits its interference in individual choices so that everyone can interact freely and consensually on an equal footing. However, given that the intimate sphere is certainly the battleground between opposing ways of understanding emotional relationships and possible consequences, it is there that the inequality between men and women manifests itself and it is precisely for this reason that feminism has strongly asserted that the staff is political. Therefore, in the present time, the places of existence of women where the vulnerability of their condition is most revealed - power over body, heterosexual relationships, reproduction, affective life -, coincide with the areas in which the violence is physical and psychologically perpetrated, marital rape, exploitation of female labor (Giolo, 2012; Faralli, 2015; Casadei, 2017). Even the role of hard-working barrier, carried out over time by the American Supreme Court, gives way to intolerance and insensitivity towards the path of individual rights and freedoms. To the militant jurist the role of sentinel of rights.

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